WAN RAMLI WAN SEMAN v. LT KOL SHARULL HESHAM MD YASIN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD KAMAL MD SHAHID J
[JUDICIALY REVIEW NO: WA-25-330-09-2021]
2 JUNE 2023

Abstract – *The constitutional role and institutional competence of the court and the Legislature/Executive are distinct. Policy decisions, especially those involving scientific, technical and medical expertise, are within the domain of the Legislature and the Executive; the court has no constitutional role or institutional competence to substitute its own views in these matters. Public health policy measures to deal with the COVID-19 pandemic necessarily involve balancing between interests and fall within the sphere of the Legislature and the Executive. The courts have been reluctant to consider the substantive merits of such policy decisions.*

ADMINISTRATIVE LAW: *Judicial review – Application for – Army sergeant/applicant discharged from service due to refusal to take COVID-19 vaccination – Charges dealt with summarily – Applicant's request for court-martial rejected – Legality of order for COVID-19 vaccination – Whether applicant denied right to be heard and procedural fairness – Whether applicant denied pension rights – Whether decision to discharge applicant tainted with illegality, irrationality, unreasonableness and procedural impropriety – Armed Forces Act 1972, ss. 50(2), 49(b), 51, 87, 96(2)*

CONSTITUTIONAL LAW: *Constitutional right – Deprivation – Army sergeant/applicant discharged from service due to refusal to take COVID-19 vaccination – Charges dealt with summarily – Applicant's request for court-martial rejected – Whether applicant denied of constitutional rights – Legality of order for COVID-19 vaccination – Whether applicant denied right to be heard and procedural fairness – Whether applicant denied pension rights – Armed Forces Act 1972, ss. 50(2), 49(b), 51, 87 & 96(2) – Federal Constitution, arts. 5(1), 8(1), 13(1) & 147*

The applicant was a former army sergeant in the Royal Malay Regiment's 24th Battalion and had been in the army service for 19 years. In March 2021, the Markas 1 Briged circulated the COVID-19 vaccine instruction which was issued by the Malaysian Army Military Base Headquarters to all teams under the Markas 1 Briged. The first respondent, the commanding officer, issued a standing order instructing all members to obey the COVID-19 vaccination order. In an interview with the first respondent and the applicant's superior officer, the applicant expressed his refusal to accept the COVID-19 vaccine. Despite a follow up interview, an interrogation and counselling sessions, the applicant still refused to receive the vaccine. The applicant was then charged

for: (i) disobeying orders to be vaccinated, pursuant to s. 50(2) of the Armed Forces Act 1972 ('Act'); (ii) using threatening or insubordinate language to a superior officer, pursuant to s. 49(b) of the Act; (iii) disobedience to a standing order, pursuant to s. 49(b) of the Act; and (iv) conduct to the prejudice of good order and service discipline, pursuant to s. 87 of the Act. The charges against the applicant were dealt with summarily by the first respondent and the applicant was found guilty and sentenced to a fine equivalent to 14 days of his salary. Following the decision of the summary trial, the first respondent recommended the applicant be dismissed. The applicant's date of discharge would have had been on 20 January 2023 but he was discharged earlier on 26 August 2021. Hence, the present judicial review by the applicant on the grounds that, *inter alia*, (i) he elected not to be vaccinated in the exercise of his constitutional right; (ii) during the trial for the four charges, the applicant requested to be court-martialled but his request was rejected by the first respondent. The applicant claimed that his right to be heard had been denied, thus constituted a serious violation of the rules of natural justice; (iii) the applicant stated that he only merely said 'I am still not agreeing to be vaccinated' which did not amount to using threatening or insubordinate language; (iv) on 3 August 2021, the applicant was informed that his discharge would be effective from 26 August 2021. At that time, the applicant was still 16 months away from his expected discharge date of 20 January 2023, which would have qualified him for a pension. As a result of the unlawful act of the respondents, the applicant lost the right to his pension, under s. 147 of the Federal Constitution ('FC'), which was a proprietary right protected by art. 13(1) of the FC; (v) the applicant was denied procedural fairness, guaranteed to him by art. 5(1) read with art. 8(1) of the FC and the decision/action to discharge him was null and void and of no effect; and (vi) the deprivation of his livelihood constituted to a deprivation of property, in violation of arts. 5(1) and 13(1) of the FC.

Held (dismissing application):

(1) The applicant was charged under ss. 50(2), 49(b), 51 and, alternatively, under s. 87 of the Act. The charges were dealt with summarily by the first respondent pursuant to s. 96(2) of the Act. The charges were within the sections allowed to be dealt with summarily by the first respondent as his commanding officer. The applicant's contention that he was not given the right to be heard when his request to be tried by a court martial was denied and, instead, dealt with summarily by the first respondent was untenable and devoid of merits. Furthermore, based on s. 97(9) of the Act, the applicant was not entitled to be given the opportunity to elect for trial by the court martial because, when the charges were dealt with summarily by the first respondent, the applicant was found guilty of the charges and the first respondent only awarded the punishment of a fine. The applicant was not denied the right to be heard as the

summary proceeding involved a hearing of witnesses and six prosecution witnesses were called. The applicant had been given the opportunity to cross-examine any prosecution witness, defend himself with the options of giving evidence on oath or make a statement without being sworn; and call witnesses in his defence. (paras 13, 14, 16, 18 & 20)

(2) The vaccination order was issued by the Malaysian army, which was imposed among the Malaysian army personnel. The applicant did not provide any materials or evidence to exempt himself from receiving the COVID-19 vaccine. As such, he was considered eligible and compulsorily required to be vaccinated. The applicant's disobedience to the orders was in contravention of ss. 51 and 50(2) of the Act. Further, the respondents' decision on the vaccination order and matters related to it were not amenable to judicial review as these were policy issues within the sphere of the respondent and therefore, the act of the respondents in issuing the vaccination order was not in violation of the applicant's right under art. 5(1) of the FC. (paras 31-33 & 46)

(3) The respondents' actions in relation to the vaccination order, which included the charges made against the applicant, the summary trial of the charges and the decision to discharge the applicant from service were all made in accordance with the law. The applicant was not deprived of his life or personal liberty when, in fact, the decisions were validly made under the Act as well as regulations made thereunder. The applicant's allegations, that he was denied procedural fairness and that the decision to discharge him was null and void, were untenable and devoid of merit. (paras 56 & 65)

(4) The applicant's employment and rights to pension were subject to the Act and the Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982 ('Regulations'). Regulation 2 of the Regulations states that military personnel who has served for 21 years may receive pensions and other benefits when he is no longer in service. The applicant did not fulfil the requirement and, hence, would not be able to receive pensions and other benefits at the time of his termination of service. The applicant's claim that his pension rights under art. 147 of the FC had been deprived could not be accepted. The applicant's pension rights were not absolute and may be subject to certain conditions and regulations. (paras 69 & 71)

Case(s) referred to:

Akira Sales & Service (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal [2018] 2 CLJ 513 FC ***(refd)***

Athavle v. New South Wales [2021] FCA 1075 ***(refd)***

Clarence Ng Chii Wei & Ors v. Menteri Kesihatan & Ors [2022] 1 CLJ 247 HC ***(refd)***

Dato' Seri Dr Ahmad Zahid Hamidi, Menteri Dalam Negeri, Kementerian Dalam Negeri & Ors v. Soo Lina & Ors [2018] 6 CLJ 285 CA ***(refd)***

Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia [2013] 2 CLJ 1009 CA ***(refd)***
Dr Vijaendreh Subramaniam & Anor v. Kerajaan Malaysia & Anor [2022] 9 CLJ 553 HC ***(refd)***
Kassam v. Hazzard & Ors [2021] 393 ALR 664 ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***
R (On The Application Of Dolan And Others) v. Secretary Of State For Health And Social Care And Another [2021] 1 All ER 780 ***(refd)***
R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Legislation referred to:
Armed Forces Act 1972, ss. 49(b), 50(2), 51, 52, 87, 96(2), 97(9), 187(1)
Armed Forces (Summary Jurisdiction) Regulations 1976, reg. 12
Armed Forces (Terms of Service of Regular Forces) Regulations 2013, reg. 61(1)(s)
Federal Constitution, arts. 5(1), 8(1), 13(1), 147
Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982, regs. 5, 6B, 24(2)
Rules of Court 2012, O. 53

For the applicant - Yasmeen Soh Sha-Nisse, Phyllia Lim, Suzana Norlihan Alias & Nur Syahirah; M/s Suzana Norlihan & Co
For the respondents - Ahmad Hanir Hambaly, SFC & Liyana Muhammad Fuad, FC; AG's Chambers

Reported by Najib Tamby

JUDGMENT

Ahmad Kamal Md Shahid J:

Introduction

[1] The applicant filed a judicial review application (encl. 7) under O. 53 of the Rules of Court 2012 (ROC) seeking *inter alia* the following reliefs:

(i) a direction of the nature of a writ of *certiorari* to quash the letter of discharge dated 4 August 2021, discharging the applicant from service;

(ii) a declaration that the letter of discharge dated 4 August 2021 and the early discharge of the applicant is null and void and of no effect;

(iii) costs; and

(iv) such other relief as may be moulded by this Honourable Court as the facts and circumstances of the case demands.

[2] After the hearing, I dismissed the applicant's judicial review application (encl. 7). I now set out the grounds for my judgment.

Background Facts

[3] The background facts gathered from the cause papers, affidavit in support and submission of the parties are largely undisputed and can be summarised as follows:

(i) the applicant is a former army sergeant in the Royal Malay Regiment's 24th battalion based in the Rasah Camp, Negeri Sembilan and had been in army service for nineteen years;

(ii) the applicant's date of discharge would have had on 20 January 2023. However, he was discharged earlier from army service on 26 August 2021 due to four offences that allegedly committed by him under the Armed Forces Act 1972 (Act 77);

(iii) the first respondent is the commanding officer of the Royal Malay Regiment's 24th battalion having an address of service at Kem Rasah, 70300 Seremban, Negeri Sembilan;

(iv) the second respondent is the officer who signed the letter of discharge dated 4 August 2021 which the applicant alleged that he was wrongfully discharged from army service;

(v) the first and second respondents were under the supervision, control, direction, law and policy administration of the third to the fifth respondents who are vicariously liable for their acts;

(vi) on 9 March 2021, the Markas 1 Briged circulated the COVID-19 vaccine instruction which was issued by the Malaysian Army Military Base Headquarters to all teams under the Markas 1 Briged;

(vii) on 15 March 2021, the first respondent issued a standing order instructing all members to obey the COVID-19 vaccination order;

(viii) on 5 July 2021, the applicant was interviewed by the first respondent and the applicant's superior officer, Captain Noor Azlan bin Husin, Kompeni A Leader, regarding the COVID-19 vaccine. During the interview, the applicant expressed his refusal to accept the COVID-19 vaccine;

(ix) on 6 July 2021, the applicant's superior officer conducted a follow-up interview with the applicant. Anyhow, the applicant still refusing to receive the vaccine;

(x) on 7 July 2021, the applicant was interviewed by the team medical officer, Kompeni A Platoon Leader and Kompeni Sergeant Major. The applicant was given counselling by the team religious officer. Despite these efforts, all the interview and counselling sessions were unsuccessful in convincing the applicant to receive the COVID-19 vaccine;

(xi) subsequently, the applicant's superior officer conducted a follow-up interrogation with the applicant and clearly stated all the instructions for taking the COVID-19 vaccine. However, the applicant continued to refuse to take the COVID-19 vaccine and disobeyed the lawful command of his superior officer to do so;

(xii) the applicant was then charged under four sections of Act 77 for the following offences: (i) disobeying orders to be vaccinated (s. 50(2) Act 77), (ii) using threatening or insubordinate language to a superior officer (s. 49(b) Act 77), (iii) disobedience to a standing order (s. 51 Act 77), and (iv) conduct to the prejudice of good order and service discipline (s. 87 Act 77). (See: exh. "A1" of the applicant's affidavit);

(xiii) on 10 July 2021, the charges against the applicant were dealt with summarily by the first respondent and the applicant was found guilty and sentenced to a fine equivalent to 14 days of his salary;

(xiv) on 10 July 2021, following the decision of the summary trial, the first respondent recommended the applicant be dismissed under reg. 61(1)(s) of the Armed Forces (Terms of Service of Regular Forces) Regulations 2013 (P.U.(A) 183/2013); and

(xv) on 30 July 2021, the Deputy Commander of the Army, Lt Gen Dato' Mohammad bin Ab Rahman approved the dismissal of the applicant under reg. 61(1)(s) of the Armed Forces (Terms of Service of Regular Forces) Regulations 2013 (P.U.(A) 183/2013). The dismissal was effective from 26 August 2021. (See: para. 6 of the first respondent's affidavit).

The Applicant's Ground For The Judicial Review

[4] Based on the statement, the applicant's challenge is based on the following grounds:

(i) on 3 July 2021, the applicant received instructions from the company clerk to take the COVID-19 vaccination at the Pusat Perubatan Angkatan Tentera (701 PPAT) Kem Rasah. The applicant, in the exercise of his constitutional right, elected not to be vaccinated;

(ii) due to the applicant's refusal to be vaccinated, he was interrogated on several occasions by the officer company (OC) one Major Noor Azlan bin Husin (Army No. 3009310) on 5 July 2021, 6 July 2021 and 9 July 2021;

(iii) on the night of 9 July 2021, the applicant was interrogated by the first respondent and six other officers including the OC, the operation officer, the chief clerk, the adjutant, a doctor and an ustaz. During that interrogation, he was put under tremendous pressure and was scolded by some of the officers for refusing to be vaccinated;

(iv) on 10 July 2021, the applicant was tried by the first respondent and was charged under four sections of Act 77. These are:

(a) disobeying orders to be vaccinated;

(b) using threatening or insubordinate language to a superior officer;

(c) disobedience to a standing order; and

(d) conduct to the prejudice of good order and service discipline.

(v) during the trial, the applicant requested to be court-martialled but his request was rejected by the first respondent. The applicant claimed that his right to be heard had been denied in which constituted a serious violation of the rules of natural justice. Additionally, the applicant also claimed that his livelihood which is protected by art. 5(1) of the Federal Constitution (FC) had been deprived of;

(vi) the applicant stated that he only merely said: "I am still not agreeing to be vaccinated" which does not amount to using threatening or insubordinate language. The applicant asserted that he has a fundamental right to refuse vaccination;

(vii) on 3 August 2021, he was informed that his discharge would be effective from 26 August 2021. At that time, the applicant was still sixteen months away from his expected discharge date of 20 January 2023 which would have qualified him for a pension. As a result of the unlawful act of the respondents, the applicant has lost the right to a pension;

(viii) subsequently on 23 August 2021, the fourth respondent issued a media statement titled "Kes Penolakan Suntikan Vaksin COVID-19 Seorang Anggota Tentera Melibatkan Sarjan Wan Ramli bin Wan Seman". The fourth respondent, in mandating the COVID-19 vaccination in the said media statement is in violation of art. 5(1) of the FC;

(ix) the applicant argues that he was denied procedural fairness, which is guaranteed to him by art. 5(1) read with art. 8(1) of the FC. Further, the decision or action to discharge him is null and void and of no effect because:

(a) the respondents took into account irrelevant considerations;

(b) the respondents failed to take into account relevant considerations;

(c) the respondents misconstrued the provisions of Act 77;

(d) the applicant was denied procedural fairness;

(e) the action of the respondents is irrational and/or unreasonable;

(f) the action of the respondents is disproportionate in all the circumstances of the case;

(g) it is unlawful discrimination in all the circumstances of the case; and

(h) it is oppressive in all the circumstances of the case.

(x) as a citizen and a member of the armed forces, the applicant is entitled to the protection afforded by arts. 5(1) and 8(1) of the FC. His rights under the said articles have been violated by reason of the action of the respondents. Hence, the said action of the respondents is unconstitutional and null and void;

(xi) due to the dishonourable discharge from service, the applicant has lost his right to pension under art. 147 of the FC which is a proprietary right protected by art. 13(1) of the FC; and

(xii) the applicant's right to livelihood is property within art. 13(1) of the FC. The deprivation of his livelihood therefore constitutes to a deprivation of property in violation of arts. 5(1) and 13(1) of the FC.

[5] The abovementioned grounds will be addressed under four main issues namely:

(i) right to be heard;

(ii) legality of order for COVID-19 vaccination;

(iii) procedural fairness; and

(iv) pension rights.

The Law

[6] Judicial review is generally concerned with the decision-making process where the impugned decision is flawed on the ground of procedural impropriety.

[7] However, the law has now developed to allow a decision to be challenged on grounds of illegality and irrationality, which then permits the courts to scrutinize the decision not only for the process, but also for substance.

[8] In the Federal Court case, *Akira Sales & Service (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal* [2018] 2 CLJ 513; [2018] 3 MLRA 589; [2018] 2 MELR 337; [2018] 2 MLJ 537, the liberal approach on judicial review in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; [1996] 1 MLRA 725; [1997] 1 AMR 433 has been re-emphasised as follows:

[45] In the same appeal, Edgar Joseph Jr FCJ (Eusoff Chin in agreement) said that an award could be reviewed for substance as well as for process:

> It is often said that judicial review is concerned not with the decision but the decision-making process. (See *eg*, *Chief Constable of North Wales Police v. Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in Judicial Review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.
>
> But Lord Diplock's other grounds for impugning a decision susceptible to Judicial Review make it abundantly clear that *such a decision is also open a challenge on grounds of 'illegality' and 'irrationality' and in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance.*
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> In this context, it is useful to note how Lord Diplock (at pp 410-411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality and (iii) procedural impropriety. This is how he put it:
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> > *By 'illegality'* as a ground for Judicial Review, I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
> >
> > *By 'irrationality'*, I mean what can by now be succinctly referred to as 'Wednesday unreasonableness' (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp*. [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] AC 14, or irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.

> I have described the third head as *'procedural impropriety'* rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that the expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.
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> Lord Diplock also mentioned *'proportionality'* as a possible fourth ground of review which called for development. (emphasis added)

[9] Further, the Court of Appeal in *Dato' Seri Dr Ahmad Zahid Hamidi, Menteri Dalam Negeri, Kementerian Dalam Negeri & Ors v. Soo Lina & Ors* [2018] 6 CLJ 285; [2018] 1 MLRA 683; [2018] 1 AMR 436; [2018] 2 MLJ 738 explained the test of reasonableness in a judicial review as follows:

> [39] The test of reasonableness has been the subject of many cases over the decades in other Commonwealth jurisdictions. For example, in dealing with the circumstances under which the court could intervene to quash the decision of an administrative officer or tribunal on ground of unreasonableness or irrationality, Henchy J of the Irish Court in The State (at the *Prosecution of John Keegan and Eoin J Lysaght) v. The Stardust Victims' Compensation Tribunal* [1986] IR 642 set a number of such circumstances in different terms. They are:
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> 1. It is fundamentally at variance with reason and common sense;
> 2. It is indefensible for hearing in the teeth of plain reason and common sense; and
> 3. Because the court is satisfied that the decision-maker has breached his obligation whereby the 'must not flagrantly reject or disregard fundamental reason common sense in reaching his decision.
>
> [41] In *Meadows v. Minister for Justice Equlity and Law Reform and others* [2010] IESC 3 Denham J in her *dicta* (ratio) set out the following test: "This test includes the implied constitutional limitation of jurisdiction of all decision-making which affects rights and duties. *Inter alia*, the decision-maker should not disregard fundamental reason or common sense in reaching his or her decision. The constitutional limitation of jurisdiction arises inter alia from the duty of the courts to protect constitutional rights. When a decision-maker makes a decision which affects rights then, or reviewing the reasonableness of the decision; (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on or rational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective.

[10] In addition, a decision that involves an error of law is subject to judicial review as explained by the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 1 MLRA 336; [1999] 3 AMR 3529; [1999] 3 MLJ 1, where it states:

> In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the 'not to be challenged, *etc*' kind, **judicial review will lie to impeach all errors of law made by an administrative body or tribunal and,** we would add, inferior courts. In the words of Lord Denning in *Pearlman v. Harrow School* (*ibid*) at p 70, ... **no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it.**
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> (emphasis added)

[11] The meaning of error of law has also been explained by the Court of Appeal in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 1 MLRA 268; [1995] 2 AMR 1601; [1995] 2 MLJ 317 in the following words:

> *It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law*, for the categories of such an error are not closed. *But it may be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations* (what may be conveniently termed an *Anisminic* error) or *if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.* (emphasis added)

[12] Based on the foregoing passages, it is my view that to succeed in an application for judicial review, the applicant must show that the respondents had, among others:

(i) asked itself the wrong questions;

(ii) considered irrelevant matters;

(iii) failed to consider relevant matters;

(iv) failed to apply the proper principle(s) of law; and/or

(v) reached a decision that was so perverse that no reasonable tribunal under similar circumstances would have reached it.

The Decision Of The Court

Right To Be Heard

[13] It is to be noted that the applicant was charged under ss. 50(2), 49(b), 51 and alternatively under s. 87 of the Act 77 for the following offences:

(i) disobeying orders to be vaccinated;

(ii) using threatening or insubordinate language to a superior officer;

(iii) disobedience to a standing order; and

(iv) conduct to the prejudice of good order and service discipline.

[14] The charges against the applicant were dealt with summarily by the first respondent, his commanding officer pursuant to s. 96(2) of the Act 77. Section 96(2) of the Act 77 provides as follows:

> **Charges to be dealt with summarily or by court-martial**
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> 96. (2) After investigation, a charge against an appointed officer or against a serviceman or volunteer (when subject to service law under this Act) below the rank of warrant officer may be dealt with summarily by his commanding officer, subject to and in accordance with the following provisions of this Part.

[15] Further, the charges against the applicant can be dealt with summarily by the first respondent pursuant to reg. 12 of the Armed Forces (Summary Jurisdiction) Regulations 1976 (Regulations 1976). Regulation 12 of the Regulations 1976 provides as follows:

> **Regulation 12. Charges with which a commanding officer or appropriate superior authority may deal summarily.**
>
> A commanding officer or an appropriate superior authority may deal summarily with a charge under any of the following sections of the Act: 44, 46(e), 49, 50(2), 51, 52, 55, 56, 57, 58, 59 (1)(a), 60, 61(c) and (d), 62(c), 63, 64, 65(2), 66, 67, 72, 77(a) and 81 (b), 86 (where the principal offence can be dealt with summarily by virtue of this Regulation) 87 and 88 (where the civil offence is one which is specified in the Second Schedule to these Regulations).

[16] Based on the above, the charges against the applicant namely ss. 50(2), 49(b), 51 and 87 of the Act 77 are within the sections allowed to be dealt with summarily by the first respondent as his commanding officer.

[17] Therefore, I view the applicant's contention that he was not given the right to be heard when his request to be tried by a court-martial was denied and instead dealt with summarily by the first respondent is untenable and devoid of merits.

[18] Further, based on sub-s. 97(9) of the Act 77, I am of the view that the applicant is not entitled to be given the opportunity to elect for trial by the court-martial because when the charges were dealt with summarily by the first respondent, the applicant was found guilty of the charges and the first respondent only awarded punishment of a fine.

[19] Subsection 97(9) of the Act 77 reads as follows:

Further proceedings on charges against an appointed officer, servicemen and volunteers below the rank of warrant officer

97. (9) Notwithstanding anything contained in subsection (3), where the commanding officer has determined that the accused is guilty and if the charge is dealt with summarily will award punishment other than severe reprimand, reprimand, fine or a minor punishment, or where a finding of guilty (whatever the punishment awarded) will involve a forfeiture of pay (other than a fine), the commanding officer shall not record a finding until after affording the accused an opportunity of electing to be tried by court- martial; and if the accused so elects and does not subsequently, in accordance with regulations made under this Part withdraw his election, the commanding officer shall not record a finding of guilty but shall take the prescribed steps with a view to the charge being tried by court-martial.

[20] Further, this court is of the view that the applicant was not denied the right to be heard as the summary proceeding involved a hearing of witnesses. When the charges were dealt with summarily by the first respondent, six prosecution witnesses were called. In this regard, the applicant had been given opportunity to do the following:

(i) cross-examine any prosecution witness;

(ii) defend himself with the options of giving evidence on oath or make a statement without being sworn; and

(iii) call witnesses in his defence.

[21] This court finds that although the applicant had been given such opportunities to defend himself, he cross-examined only one prosecution witness for all charges *ie*, saksi tambahan pertama. Other than that, he opted not to cross-examine the remaining prosecution witnesses. He chose to remain silent and did not give evidence on oath or make a statement. Furthermore, he did not call any witness in his defence.

[22] Based on the above, this court finds that the applicant's allegation that he had been denied the right to be heard cannot be true, when in fact, he was given all the opportunities to defend himself when the charges were dealt summarily by the first respondent.

[23] Hence, I am of the view that the act of the first respondent which dismissed the applicant's request to be tried by the court-martial and proceeded to deal the charges summarily were done in accordance with law.

Legality Of Order For COVID-19 Vaccination

[24] The applicant submits that:

(i) by wrongfully discharging the applicant from service, he has therefore

A lost his employment and livelihood. His right to be engaged in gainful employment and the security of tenure is a guaranteed fundamental right under the FC;

(ii) as a result of the respondent's decision and action, the applicant's right to life guaranteed under art. 5(1) of the FC has been violated;

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(iii) the applicant has the freedom of choice under art. 5(1) of the FC to elect whether or not he wishes to be vaccinated. This Honourable Court has a wide discretion to issue directions, orders or writs to reach injustice wherever it is found;

C (iv) in wrongfully discharging the applicant from service, he has been deprived of his pension rights under art. 147 of the FC and a proprietary right guaranteed under art. 13(1) of the FC;

(v) it is therefore disproportionate for the respondents to discharge the applicant and deprive him of his pension due to his refusal to be

D vaccinated;

(vi) the applicant has a fundamental right under art. 5(1) of the FC to refuse vaccination. The respondents have failed to take into account relevant considerations and have acted irrationally and unreasonably in discharging the applicant; and

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(vii) it is disproportionate for the respondents to discharge the applicant for exercising his fundamental rights under art. 5(1) of the FC. The dismissal of the applicant is therefore null and void for breach of natural justice and/or procedural fairness.

F **[25]** It is to be noted that the COVID-19 vaccination order imposed on all Malaysian Army personnel including the applicant was circulated *via* letter dated 3 March 2021 (vaccination order) (See: exh. M1 of the respondents' affidavit). Based on the vaccination order, the COVID-19 vaccination is mandatory to all Malaysian Army personnel except for those belonging in

G the group not eligible to be vaccinated such as those who have history of hospitalisation due to severe allergies and those who experienced severe allergic reaction after receiving the first dose of comirnaty brand vaccine or any other vaccine. Further, disciplinary action can be taken for those who disobey the said order.

H **[26]** The vaccination order was circulated to all personnel at Batalion 24 Rejimen Askar Melayu Diraja, Kem Rasah, Seremban (Batalion 24) where the applicant was serving, by way of Perintah Bahagian Pertama dated 15 March 2021 by the first respondent (standing order). (See: exh. M2 of the respondents' affidavit).

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[27] The applicant had clearly disobeyed the standing order and used threatening or insubordinate language to a superior officer when he disobeyed the order to be vaccinated.

[28] The relevant provisions to the said disobediences of which the Applicant was found guilty are under ss. 50(2), 49(b), 51 of the Act 77 which are produced below:

Disobedience to superior officer

50. (1) Every person subject to service law under this Act who, whether wilfully or through neglect, disobeys any lawful command of his superior officer shall, on conviction by court-martial, be liable to imprisonment or any less punishment or any less punishment provided by this Act:

Provided that if the offence was not committed on active service, he shall not be liable to be imprisoned for more than two years.

Insubordinate behaviour

49. Every person subject to service law under this Act who:

(a) Strikes or otherwise uses violence to or offers violence to his superior officer; or

(b) Uses threatening or insubordinate language to his superior officer,

shall, on conviction by court-martial, be liable to imprisonment or any less punishment provided by this Act.

Provided that he shall not be liable to imprisonment for more than two years if the offence was not committed on active service and did not involve the striking or other use of violence or offering of violence to a superior officer exercising authority as such.

Disobedience to standing orders

51. (1) Every person subject to service law under this Act who contravenes or fails to comply with any provision of orders to which this section applies, being a provision known to him or which he might reasonably be expected to know, shall, on conviction by court-martial, be liable to imprisonment for a term not exceeding two years or any less punishment provided by this Act.

(2) This section applies to standing orders or other routine orders of a continuing nature for any formation or unit or body of troops, or for any command or other area, establishment, garrison or place, or for any ship, train or aircraft.

(3) The standing orders or other routine orders described in subsection (2) may be:

(a) made by; and

(b) published in such manner as may be determined by,

the Service Chief for each Service or any officer authorized by him.

[29] Having perused the cause papers, this court finds that the first respondent had circulated the standing order dated 15 March 2021 which explicitly included the vaccination order applicable to all personnel of Batalion 24, where the applicant was serving.

[30] The applicant received a lawful command from his superior officer, captain Noor Azlan bin Husin, Kompeni A Leader, Batalion 24, regarding the mandatory requirement of COVID-19 vaccine on all Malaysian Army personnel on 5 July 2021, 6 July 2021 and 7 July 2021.

[31] Further, this court finds that the applicant did not provide any materials or evidence to exempt him from receiving the COVID-19 vaccine. As such, it is considered he is eligible and compulsorily required to be vaccinated.

[32] I am of the view that as a member of the Malaysian Army serving in the Batalion 24, it is the applicant's duty to obey the standing orders and lawful command of his superior officers. The applicant's disobedience to the said orders is in contravention of ss. 51 and 50(2) of the Act 77.

[33] The vaccination order was issued by the Malaysian Army which is imposed among the Malaysian Army personnel. It is a matter of policy decision and is relevant to the operational functioning of the Malaysian Army.

[34] The issuance of the standing order, the respondents as the authority are making a specific policy regarding the mandatory requirement of COVID-19 vaccine for all Malaysian Army personnel. This policy is to reduce the risk of infection among Malaysian Army members and prevent the formation of clusters within the army during the ongoing pandemic. Undisputedly, the formulation of policy in the public interest is the business of the elected branches of government.

[35] The decisions of government call for wider considerations, taking into account the conflicting interests and the needs of the community as a whole. The policy-making process is necessarily future-oriented, flexible, and can be swiftly changed to adapt to changing circumstances. These characteristics render the government best placed to make policy decisions.

[36] On the contrary, the administration of justice is the business of the court. The determination by the court is focused on the rights and duties of the parties before it, considering the circumstances and evidence of the case.

[37] The importance of recognising the respective institutional competence of the court and the government was stressed by the Federal Court in *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 CLJ 1009; [2013] 2 MLJ 321; [2013] 2 MLR A 179; [2013] 3 AMR 315; where Raus Sharif PCA (later CJ) held:

> … It is our view that the courts is in no position to evaluate the qualifications in the application for the Special Constituency Allocation and to determine or decide on the policy made by the executive. *We have to take cognisance of the fact that government policies emanate after consideration of a number of technical factors which are often non legal; and judges do not possess the necessary information and expertise to evaluate these non-legal factors and to pass judgment on the appropriateness or adequacy of a particular policy.*
>
> *… On matters affecting policy and requiring technical expertise, the court would leave the matter for decision of those who are qualified to address this issue.* Unless the policy or action is inconsistent with the constitution and the laws or arbitrary or irrational or abuse of power, the court will not interfere with such matters
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> *… Clearly, what was decided by the second respondent hinged on matters relating to policy and thus we would dissuade ourselves from entering into the realm which belongs to the executive. Courts must be wary of unduly extending its judicial arms to policy matters which are exclusively within the domain of the executive.* Unwarranted usurpation and transgression by the judiciary into the realm of the executive and *vice versa* will bring about disrepute to our system of government which upholds the separation of powers between the three main components *vis a vis* the executive, the legislature and the judiciary.
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> (emphasis added)

[38] As the impugned decision of the respondents involved policy considerations *ie*, the administrative decisions and court do not possess knowledge of the policy considerations which underline such decisions, I am of the considered view that this court ought not to review the reasoning of the respondents in making the decision with a view to submitting the court's own opinion on the basis of what is considered to be fair and reasonable on the merits.

[39] Further, I find that restrictions on movement and employment relating to COVID-19 vaccination have been imposed in several countries. The legality and constitutionality of such restrictions have previously been upheld by the courts across other jurisdictions.

[40] In *Athavle v. New South Wales* [2021] FCA 1075, the Federal Court of Australia heard an application for injunctive relief against the state's policy on social distancing and gatherings, which restricted the applicants from celebrating certain religious events. The application was dismissed. It was held that (at [79], [100]):

> The terms of the State instruments represent the weighing or balancing of competing interests by the maker of the instrument, whose objective is to protect the public and its institutions from deleterious effects of the COVID-19 pandemic, while also recognizing the justification for some limited exceptions to that protection. Plainly this involves an evaluative judgment with a heavy political and policy content. … *Their challenge impermissibly invites the Court to determine on the merits complex policy choices. …*

A *As I have repeatedly emphasized, it is not the Court's task to engage in a merits review of those policy choices. Those choices require a balance between competing interests. A primary interest will be public health and public protection but other interests need to be balanced. It is a matter for the executive and not the Court to strike that balance.* (emphasis added)

B **[41]** Further, in *R (on the application of Dolan and others) v. Secretary of State for Health and Social Care and another* [2021] 1 All ER 780. The Court of Appeal highlighted that the measures under challenge involved judgments of medical and scientific evidence and expert advice. In this context, the Court of Appeal found it "impossible to accept that a court could possibly intervene" and held that (at [89] to [90], [95], [97]):

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We also bear in mind that this is an area in which the Secretary of State had to make difficult judgements about medical and scientific issues and did so after taking advice from relevant experts ... [A]n analogy can be drawn with what was said by Lord Bingham of Cornhill CJ in *R v. Secretary of State for Health, ex p Eastside Cheese Co (RA Duckett & Co, interested party)* (1999) 55 BMLR 38 at 58, [1999] 3 CMLR 123 at para 47: *'on public health issues which require the evaluation of complex scientific evidence, the national court may and should be slow to interfere with a decision which a responsible decision-maker has reached after consultation with its expert advisers'.* ... [W]e consider that a wide margin of judgement must be afforded to the Government and to Parliament. *This is on the well-established grounds both of democratic accountability and institutional competence. We bear in mind that the Secretary of State had access to expert advice which was particularly important in the context of a new virus and where scientific knowledge was inevitably developing at a fast pace. The fact that others may disagree with some of those expert views is neither here nor there. The Government was entitled to proceed on the basis of the advice which it was receiving and balance the public health advice with other matters.* (emphasis added)

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[42] In *Kassam v. Hazzard & Ors* [2021] 393 ALR 664, the plaintiffs challenged a public health order that prohibited them from working in the construction, aged care, and education sectors, unless they had been vaccinated with an approved COVID-19 vaccine. Two judicial review applications were heard together. The Supreme Court of New South Wales dismissed both applications and upheld the legality of the impugned order.

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[43] Beech-Jones CJ emphasised the limits of the court's function in determining the merits of such public health orders (at [7]):

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[I]n considering the grounds of challenge raised in both proceedings it is important to note that it is not the Court's function to determine the merits of the exercise of the power by the Minister to make the impugned orders, much less for the Court to choose between plausible responses to the risks to the public health posed by the Delta variant. *It is also not the Court's function to conclusively determine the effectiveness of some of the alleged treatments for those infected or the effectiveness of COVID-19 vaccines especially their capacity to inhibit the spread of the disease. These are all matters of merits, policy and fact for the decision maker and not the Court.* (emphasis added)

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(See also: *Clarence Ng Chii Wei & Ors v. Menteri Kesihatan & Ors* [2022] 1 CLJ 247; [2022] 1 MLRH 262; [2021] MLJU 2198; *Dr V Vijaendreh Subramaniam & Anor v. Kerajaan Malaysia & Anor* [2022] 9 CLJ 553; [2023] 1 MLRH 592; [2023] 7 MLJ 922).

[44] Based on the above case laws, it is clear that:

(i) the constitutional role and institutional competence of the court and the legislature/executive are distinct. Policy decisions, especially those involving scientific, technical and medical expertise, are within the domain of the legislature and executive;

(ii) the court has no constitutional role or institutional competence to substitute its own views on scientific and technical policy matters. Neither is it the function of the court to choose between competing views in such matters;

(iii) public health policy measures to deal with the COVID-19 pandemic necessarily involve balancing between competing interests, and fall within the sphere of the legislature and executive. Courts have been reluctant to consider the substantive merits of such policy decisions, if at all; and

(iv) courts have consistently declined to make scientific or technical judgments on the merits of COVID-19 vaccinations, and declined to entertain arguments based on concerns about their efficacy, safety and potential risks to health.

[45] Reverting to the facts in the present case, this court is of the view that:

(i) the COVID-19 pandemic had been declared by the World Health Organization (WHO). Malaysia, in general and in this case, the Malaysia Army was also affected by the outbreak;

(ii) the vaccination order among the Malaysian Army is mandatory on the basis that Malaysian Army members live in groups, their role and responsibility as front liners in carrying out daily tasks and training, and they have also faced with a high probability of being easily infected with COVID-19. Accordingly, it is appropriate for all Malaysian Army members to take the vaccine to curb contagion among themselves, their families and even society as a whole;

(iii) this contagion is highly dangerous and it can affect the operational service of the Malaysian Army, especially in defending Malaysia's sovereignty and its interest from external threats as well as in safeguarding the national security; and

(iv) in this regard, the respondents are justified in issuing the vaccination order and related measures to curb the COVID-19 pandemic situation within the Malaysian Army. The mandatory requirement to be

vaccinated is exempted to those belonging in the group not eligible to be vaccinated. Thus, the mandatory requirement is also balanced with exceptions for individuals' interests. It is noted that, the applicant did not provide any relevant material or evidence that he is not eligible to be vaccinated.

[46] Based on the above, this court is of the view that the respondents decision on the vaccination order and matters related to it are not amenable to judicial review as these are policy issues within the sphere of the respondent and therefore, the act of the respondents in issuing the vaccination order is not violation of the applicant's right under art. 5(1) of the FC as alleged by the applicant.

Procedural Fairness

[47] The applicant alleged that he was denied procedural fairness which is guaranteed to him by art. 5(1) read with art. 8(1) of the FC and the decision to discharge him is null and void.

[48] Based on the applicant's grounds on this issue, the main allegations include: the respondents failed to take into account relevant considerations, misconstrued the provisions of the Act 77, the applicant was denied procedural fairness, the respondents' action is irrational and/or unreasonable, unlawful discrimination and oppressive in all the circumstances of the case.

[49] This court finds that the respondents act to discharge the applicant from service was made pursuant to reg. 61(1)(s) of the Armed Forces (Terms of Service of Regular Forces) Regulations 2013 (P.U.(A) 183/2013).

[50] The vaccination order was equally imposed to all Malaysian Army personnel and only those who belong in the group which are not eligible to receive the Covid-19 vaccine are exempted to receive the COVID-19 vaccine.

[51] The applicant was given the opportunity to not receive the COVID-19 vaccine if he met the criteria for being in the category of members who are not eligible for vaccination.

[52] Due to his refusal to receive the COVID-19 vaccine, he was then charged for offences made under the Act 77. This court finds that the respondents' act in relation to the charges against the applicant and the punishment awarded were all made in accordance with law, in particular under the Act 77. Therefore, the applicant's allegation that the respondents had misconstrued the provisions of the Act 77 is groundless and baseless.

[53] Further, I find that the respondents had taken all the necessary considerations based on the statements of the witnesses during the summary trial and had given the applicant the opportunity to defend himself. The

applicant's position of remaining silent, did not produce his own witness as well as cross-examining one prosecution witness were all taken into consideration in making the decision and awarding punishment of a fine of 14 days salary.

[54] The applicant had every opportunity to defend himself and adduce his own evidence if he wishes the respondents to take into account relevant considerations from his side. Failing to do so, he cannot now raise argument that the respondents had failed to take into account relevant considerations and their action is irrational and/or unreasonable.

[55] The respondents' decision to discharge the applicant from service was made by taking into relevant consideration particularly the applicant's disobedience to obey the standing order containing the vaccination order when he refused to receive the COVID-19 vaccine as well as his act of insubordination to his superior officer.

[56] This court is of the view that the respondents' actions in relation to the vaccination order which included the charges made against the applicant, the summary trial of the charges and the decision to discharge the applicant from service were all made in accordance with the law. The applicant was not deprived of his life or personal liberty when in fact, the decisions were validly made under the Act 77 as well as regulations made thereunder.

[57] It is to be noted that the vaccination order was issued to all Malaysian Army personnel except for those eligible not to receive the COVID-19 vaccine. There was no issue of discrimination made against the applicant as he was equally treated like other Malaysian Army personnel who does not belong in the categories of people not eligible to be vaccinated.

[58] This court is of the view that the vaccination order issued was not considered as discriminatory when it was imposed on the same class of person *ie*, all military personnel and this is allowed, as supported by the abovementioned cases. The vaccination order was also made based on reasonable consideration that is as a measure to curb the COVID-19 pandemic among the Malaysian Army and this should not be discriminatory.

[59] Further, I find that the issuance of the vaccination order was reasonably balanced with the interest of the individual and the armed forces. The vaccination order was issued to ensure the risk of infection among Malaysian Army members can be reduced and prevent the existence of clusters among members. As the applicant had failed to provide any relevant material to exempt himself from being vaccinated, he is thereby obliged to comply with the vaccination order.

[60] The respondents had issued the vaccination order based on s. 50(2) of the Act 77. This is a lawful command which is applicable to all military personnel. The decision to discharge the applicant from service was made

after taking into account all the relevant circumstances, in particular, his disobediences which he was found guilty of under ss. 50(2), 49(b), 51 of the Act 77 during the summary trial on 10 July 2022.

[61] The applicant further alleged that due to his dismissal, he has therefore lost his employment and livelihood which is a guaranteed fundamental right under art. 5(1) of the FC.

[62] However, this court is of the view that restriction or limitation which affects employment of a person is not a violation of art. 5(1) of the FC as right to employment is not absolute.

[63] The applicant ought to know that his employment is subject to the Act 77 and the regulations made therein and as a member of the Malaysian Army, it is his duty to adhere and obey the orders imposed upon him in accordance with the Act 77 and relevant regulations.

[64] As a military officer, the applicant has duty to follow instructions given in order to maintain discipline. The military legal system requires a higher degree of discipline within the armed forces.

[65] Based on the above, this court is of the view that the applicant's allegations that he was denied procedural fairness and the decision to discharge him is null and void are untenable and devoid of merits.

Pension Rights

[66] The applicant contended that being wrongfully discharged from service has resulted in the deprivation of his pension rights as guaranteed under art. 147 of the FC.

[67] As a member of the Malaysian Army, the applicant is bound by provisions under the Act 77. Section 187(1) of the Act 77 specifically provides the power of the Armed Forces Council with the approval of the Yang di-Pertuan Agong to make regulations relating to pensions of members of the regular forces.

[68] In exercising the powers conferred by s. 187 of the Act 77, the Armed Forces Council, with the approval of the Yang di-Pertuan Agong, makes the Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982. Regulation 5 and 6B of the Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982 provides as follows:

> 5. **Tiada seorangpun anggota atau mana-mana orang lain mempunyai hak mutlak terhadap pampasan kerana khidmat yang lalu atau terhadap apa-apa pencen,** ganjaran atau faedah-faedah lain di bawah Peraturan-Peraturan ini.
>
> 6B. Majlis Angkatan Tentera boleh, **mengikut peruntukan-peruntukan Perturan-Peraturan ini, memberi pencen,** ganjaran dan faedah-faedah lain kepada anggota-anggota Angkatan Tetap atau orang-orang

tanggungan mereka atau, jika tidak ada orang tanggungan, ganjaran ini, jika ada, boleh diberi kepada wakil-wakil mereka yang sah disisi undang-undang. (emphasis added)

[69] Based on the above, it is evident that the applicant's employment and his rights to pension are subject to the Act 77 and Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982. These Regulation was made by the Armed Forces Council, with the approval of the Yang di-Pertuan Agong.

[70] Regulation 24(2) of the Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982 states that military personnel who has served for 21 years may receive pensions and other benefits when he is no longer in service. However, the applicant did not fulfil the requirement, hence, he will not be able to receive pensions and other benefits at the time of his termination of service.

[71] Based on the abovementioned authorities, it is the court's view that, the applicant's claim that his pension rights under art. 147 of the FC have been deprived cannot be accepted. This is because being a military personnel, his employment is governed by the Act 77 and the Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982 which was made under s. 187(1) of the Act 77. It is apparent from these provisions that the applicant's pension rights are not absolute and may be subject to certain conditions and regulations.

Conclusion

[72] After perusing all the cause papers and evidence, I find that the decisions made by the respondents against the applicant were made in accordance with the law and free from any illegality, irrationality, unreasonableness or procedural impropriety.

[73] Therefore, the applicant's application for judicial review (encl. 7) is dismissed with no order as to costs.